INTERIOR BOARD OF INDIAN APPEALS

Crow Tribe of Montana v. Montana State Director, Bureau of Land Management

31 IBIA 16 (05/19/1997)

Related Board case:
31 IBIA 225

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

CROW TRIBE OF MONTANA
v.
MONTANA STATE DIRECTOR, BUREAU OF LAND MANAGEMENT

IBIA 97-118-A Decided May 19, 1997

Appeal by the Bureau of Land Management from a decision issued by an administrative law judge in an appeal filed by the Crow Tribe concerning a declination to contract under the Indian Self-Determination Act.

Affirmed as modified.

1. Contracts: Indian Self-Determination and Education Assistance Art: Generally--Indians: Indian Self-Determination and Education Assistance Act: Pre-award Appeals

   Under 25 C.F.R. §§ 900.165(b) and (c) and 900.166, any party to an appeal from a pre-contract award decision under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994), including the affected Federal bureau, may appeal from a decision rendered by an administrative law judge.

2. Administrative Procedure: Burden of Proof--Contracts: Indian Self-Determination and Education Assistance Act: Burden of Proof--Indians: Indian Self-Determination and Education Assistance Act: Pre-award Appeals

   When the Department declines to enter into a contract under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994), either in whole or in part, it has the burden of proving the validity of its declination. 25 U.S.C. § 450f(e)(1) (1994).

3. Contracts: Indian Self-Determination and Education Assistance Act: Generally--Equal Access to Justice Act: Indian Self-Determination and Education Assistance Act--Indians: Indian Self-Determination and Education Assistance Act: Appeal Costs--Indians: Attorneys: Fees

   Under 25 U.S.C. § 450m-1(c) (1994), reimbursement for expenses associated with an administrative appeal from an agency declination to contract under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994), may be sought under the Equal Access to Justice Act, 5 U.S.C. § 504 (1994).

APPEARANCES: John Fredericks III, Esq., Boulder, Colorado, for the Crow Tribe; Gavin M. Frost, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the State Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The Crow Tribe of Montana (Tribe) sought review of a May 9, 1996, decision of the Montana State Director, Bureau of Land Management (BLM), declining to enter into a contract for certain solid mineral functions under the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n (1994) (ISDA). 1/ The appeal was assigned to Administrative Law Judge (ALJ) James H. Heffernan for a hearing and decision. The BLM sought review of Judge Heffernan's decision. For the reasons discussed below, the Board of Indian Appeals (Board) affirms Judge Heffernan's decision as modified in this decision.

Background

The Board provides only so much of the background information of this appeal as is helpful for an understanding of its decision.

On October 14, 1995, the Crow Tribal Council adopted Tribal Resolution No. 96-06, which authorized the Tribe to enter into an ISDA contract with BLM to plan, conduct, and administer the BLM's solid minerals program on the reservation. In November 1995, the Tribe notified BLM of its intention to enter into an ISDA contract for these functions.

Although the Tribe and BLM engaged in protracted negotiations concerning the contract, by letter dated May 9, 1996, BLM informed the Tribe that it was "ready to agree to a contract * * * based on the discussion above and the enclosed budget." Letter at 7. However, it continued that "[n]egotiations are concluded for this contract. The Crow Tribe must either accept our proposal or move the matter to the next level" (Id.), i.e., file an appeal.

On June 7, 1996, the Tribe filed a notice of appeal with BLM, requesting a hearing pursuant to 25 U.S.C. § 450f(b)(3). The notice of appeal was received in the Office of Hearings and Appeals (OHA) of the Department of the Interior (Department) on July 15, 1996. New ISDA regulations, including appeal procedures, had been published in the Federal Register on June 24, 1996, but were not scheduled to take effect until August 23, 1996. By order dated July 17, 1996, the OHA Director assigned the appeal to Judge Heffernan under the decision in Absentee Shawnee Tribe of Oklahoma, 10 OHA 193 (1994). 2/ The assignment order stated that any party could appeal Judge Heffernan's decision under 43 C.F.R. Part 4, Subpart G, which establishes procedures for appealing Departmental decisions from which there is

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1/ All further citations to the United States Code are to the 1994 edition.

2/ Absentee Shawnee Tribe established procedures for appealing from ISDA decisions of Departmental bureaus other than the Bureau of Indian Affairs pending promulgation of Department-wide regulations.

a right of appeal but which do not fall within the jurisdiction of a standing OHA appellate board.

After engaging in further settlement negotiations, the parties reduced to three the number of issues on which they were unable to reach agreement. The Tribe waived its right to an evidentiary hearing. However, the parties filed briefs and a telephonic oral argument was conducted on January 9, 1997. Judge Heffernan issued a decision on January 22, 1997.

By notice dated February 18, 1997, ELM appealed to the OHA Director that portion of Judge Heffernan's decision which awarded $19,928.13 to the Tribe as startup costs. On March 11, 1997, the OHA Director assigned the appeal to an Ad Hoc Board of Appeals (Ad Hoc Board) under the decision in Absentee Shawnee Tribe and 43 C.F.R. Part 4, Subpart G. On March 21, 1997, the Ad Hoc Board received a copy of BLM's opening brief by facsimile transmission. It received the original brief on March 24, 1997.

On April 14, 1997, the Ad Hoc Board received a motion from the Tribe in which the Tribe sought dismissal of the appeal on the grounds that BLM lacked standing under both 43 C.F.R. Part 4, Subpart G, and 25 U.S.C. § 450f(b). The BLM opposed the motion in a filing which the Ad Hoc Board received on April 28, 1997.

After further consideration, on April 28, 1997, the OHA Director concluded that, because the regulations implementing ISDA were in effect, "the decision in Absentee Shawnee, supra, is no longer applicable to the instant situation." Therefore, he vacated his March 11, 1997, order assigning this case to an Ad Hoc Board and, citing 25 C.F.R. §§ 900.150 and 900.165, 3/ transferred the case to this Board.

By order dated April 30, 1997, the Board denied the Tribe's motion to dismiss. On May 5, 1997, the Tribe moved either to strike BLM's Opening Brief in its entirety or to strike certain portions of it. The Tribe also argued that Judge Heffernan's decision is already final.

The BLM opposed the Tribe's motion in a filing which the Board received on May 12, 1997.

Standing

The Board's April 30, 1997, order concerning the standing of a Federal bureau to appeal from an order issued by an ALJ in an ISDA case was a matter

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3/ The regulations to be codified at 25 C.F.R. Part 900 appear at 61 Fed. Reg. 32,482 (June 24, 1996). For ease of reference, the Board will refer to the section numbers as they will appear in the Code of Federal Regulations.

Sections 900.150 and 900.165 provide that appeals from an ALJ's decision concerning an ISDA contract with the Department are taken to this Board.

of first impression. The Board therefore repeats relevant portions of that order here:

> The Tribe contends that 25 U.S.C. § 450f(b) authorizes appeals only by a tribe or tribal organization. Section 450f(b) provides:
>
> > Whenever the Secretary declines to enter into a self-determination contract or contracts pursuant to subsection (a) of this section, the Secretary shall--
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> * * * * * *
>
> > (3) provide the tribal organization with a hearing on the record with the right to engage in full discovery relevant to any issue in the matter and the opportunity for appeal on the objections raised, under such rules and regulations as the Secretary may promulgate, except that the tribe or tribal organization may, in lieu of filing such appeal, exercise the option to initiate an action in a Federal district court and proceed directly to such court pursuant to section 450m-l(a) of this title.
>
> In support of its interpretation of this statute as prohibiting the affected Federal bureau from objecting to an ALJ's decision, the Tribe cites Director, Office of Workmen's Compensation Programs v. Newport News Shipbuilding and Dry Dock Co., 514 U.S. 122, 131 L.Ed.2d 160 (1995). The Tribe contends that, in concluding that the Director of the Office of Workmen's Compensation Programs lacked standing to bring an appeal, the Court "noted that the statute at issue did not by its terms give the agency authority to prosecute appeals to the Benefits Review Board and thereafter to the United States Court of Appeals." Motion to Dismiss at 3.
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> As stated by the Court, the question before it was "whether the Director of the Office of Workmen's Compensation Programs in the United States Department of Labor has standing under § 921(c) of the Longshore and Harbor Workers' Compensation Act * * *, 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq. * * *, to seek judicial review of decisions by the Benefits Review Board." 131 L.Ed.2d at 165-66. The Court noted: "With regard to claims that proceed to ALJ hearings, the Act does not by its terms make the Director a party to the proceedings, or grant her authority to prosecute appeals to the Board, or thence to the federal court of appeals." Id. at 167. The court considered and rejected the Director's contention that she was a "person adversely affected or aggrieved" by the decision within the meaning of the Longshore and Harbor worker's Compensation Act.

The Board finds this case inapposite for three primary reasons. First, the affected Federal bureau during an ISDA appeal is clearly a party to that proceeding. Second, ISDA nowhere restricts administrative review to a "person adversely affected or aggrieved." And third, in any event, the Court in Newport News was addressing the question of judicial review of a final agency decision, not administrative review of a decision not yet final for the agency.

The Board therefore addresses whether in itself 25 U.S.C. § 450f(b)(3) prohibits the affected bureau from objecting to an ALJ decision.

In enacting ISDA and its amendments, Congress was concerned with ensuring that the rights granted to tribes and tribal organizations under ISDA were fully protected. The reference in section 450f(b)(3) to the right of a tribe or tribal organization to file an administrative appeal is an example of this Congressional concern. However, Congress apparently did not see a need to specify any other aspects of the hearings and appeals procedures, but instead authorized the Secretary to promulgate such regulations. The only additional restriction on those regulations was the requirement contained in the 1994 amendments that the regulations be developed with direct tribal participation using the Negotiated Rulemaking Act of 1990 as a guide. According to the preamble to the publication of the ISDA regulations, those regulations were developed by a negotiated rulemaking committee which included 45 tribal representatives among its 63 members. 61 Fed. Reg. 32,482, 32,483 (June 24, 1996).

The Board concludes that the negotiated rulemaking committee was not precluded by section 450f(b)(3) from authorizing affected Federal bureaus to object to an ALJ decision. The question therefore, is whether the ISDA regulations contain such authorization.

Under 25 C.F.R. § 900.165(b) and (c), an ALJ must include in his/her decision a statement setting forth appeal rights. That required statement includes the following language: "If neither party files an objection to the recommended decision within 30 days, the recommended decision will become final." Furthermore, 25 C.F.R. § 900.166 provides that "[a]ny party to the appeal may file precise and specific written objections to the [ALJ's] recommended decision, or any other comments, within 30 days of receiving the recommended decision." Also, 25 C.F.R. § 900.164 states that "[b]oth the Indian tribe or tribal organization and the government agency have the same rights during the appeal process." Although the specific examples of rights listed in section 900.164 are rights which would arise during the hearing, the listing does not purport to exclude rights not listed, such as the right to object to an ALJ decision. The Board finds the language of the quoted portion of section 900.164 consistent with sections 900.165(b) and (c) and 900.166.

Admittedly, there is other language in the regulations that could be read to limit the right of appeal to a tribe or tribal organization. For example, the title of 25 C.F.R. § 900.167 is: "If an Indian tribe or tribal organization objects to the recommended decision, what will the Secretary of Health and Human Services or the IBIA [Board] do?" Also, 25 C.F.R. § 900.165(a) ends with the sentence: "The recommended decision shall also state that the Indian tribe or tribal organization has the right to object to the recommended decision." The preamble to the ISDA regulations does not include any discussion of the question of whether the affected Federal bureau has standing to object to an ALJ's decision.

[1] The Board concludes that, despite the general language in 25 C.F.R. §§ 900.165(a) and 900.167, a right to object to an ALJ's decision is clearly given to any party to the appeal in 25 C.F.R. §§ 900.165(b) and (c) and 900.166.

The Board finds that the right of a bureau to pursue an administrative appeal is consistent with Congress' expressed intent that decisionmaking under ISDA be consistent. Without a right of the bureau to object to ALJ decisions, the Department would be severely limited in its ability to ensure consistency in the decisionmaking process.

The Tribe also argues that 25 U.S.C. § 450f(e)(2) clarifies that a final agency decision may be made by an ALJ. The Board agrees. However, it sees no reason in ISDA why the fact that an ALJ may issue a decision that will become final for the Department precluded the negotiated rulemaking committee in any way from developing regulations which authorized the affected bureau to object to an ALJ decision.

The Tribe next contends that because ISDA was passed for the benefit of tribes, any ambiguities in it must be resolved in the Tribe's favor. It argues that its interpretation of section 450f(b)(3) is reasonable and that BLM and the Board must defer to that interpretation.

This argument overlooks the fact that section 450f(b)(3) has already been interpreted by both the negotiated rulemaking committee and the Department in developing and promulgating the regulations. That interpretation, which is contained in 25 C.F.R. §§ 900.165(b) and (c) and 900.166, is that all parties have a right to object to an ALJ decision. The Board lacks authority to overrule, ignore, or declare invalid a duly promulgated regulation. See, e.g., Edwards v. Portland Area Director, 29 IBIA 12, 13 (1995), Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 218 (1994), and cases cited therein. Even if it had such authority--which

> it repeats it does not have--the Board would be particularly circumspect in exercising it when the regulation at issue was developed through the negotiated rulemaking process.
>
> Finally, the Tribe argues that it should not be put to "the expense and inconvenience of further agency appeal proceedings at the behest of dissatisfied agency officials when the disputed funding items under the ISDA have been resolved to the Tribe's satisfaction." Motion to Dismiss at G.
>
> The expense, inconvenience, and delay of further appeal proceedings are addressed under 25 C.F.R. § 900.167, which provides that the Board "has 20 days from the date it receives any timely written objections to modify, adopt, or reverse the recommended decision. If * * * the [Board] does not modify or reverse the recommended decision during that time, the recommended decision automatically becomes final." This regulation contemplates an expedited decision on any objections. It does not provide for briefing on the objections, but rather anticipates that the Board will issue a decision based on the information already provided by the parties. [4/] While the Board does not here address the issue of whether the parties could agree to an extension of the 20-day period in order to file briefs, it does note that the regulations have attempted to minimize any additional expense or inconvenience attributable to an appeal from an ALJ's decision.

Order Denying Motion to Dismiss at unnumbered 2-5.

Motion to Strike

In arguing that BLM's Opening Brief should be stricken, the Tribe contends that, because the Board based its denial of the Motion to Dismiss on the regulations in 25 C.F.R. Part 900, those regulations must also be employed to "preclude a party from filing a brief and otherwise rearguing the merits of their case." Motion to Strike at 3. The Tribe continues:

> The tenor of Part 900, Subpart L [Appeals], clearly indicates that the [Board's] function in reviewing an ALJ's decision is limited. Sections 900.165(a) and (c) provide that within 30 days of an ALJ's recommended decision, either party may file a "written objection." Section 900.166 requires the objecting party to "file precise and specific written objections to the recommended decision" within 30 days of the decision. Once a timely written objection is filed with the [Board], the [Board] has 20 days within which to "modify, adopt, or reverse the recommended decision." 25 C.F.R. § 900-167(a).

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4/ See discussion under Motion to Strike section for clarification of this statement.

> Clearly, the requirement that an objecting party file "precise and specific" written objections and the limited review period that follows [do] not encompass the right of the BLM to file a 30 page brief which essentially reargues the merits of the position it took before the ALJ. Furthermore, the BLM's opening brief was filed with the Director of OHA well after the 30 day deadline for filing written objections had expired. At most, the [Board] is entitled to treat the BLM's notice of appeal filed with the Director as a written objection within the meaning of § 900-166, since the notice of appeal, dated February 18, 1997, was the only document filed by the BLM within the 30 day time period.
>
> Accordingly, complying with the letter of Part 900, as the [Board] did when it denied the Tribe's motion to dismiss, it is plain that the BLM has no right to file a brief, and the Tribe should not he compelled to spend the substantial time and resources necessary to respond to it.

Motion to Strike at 3-4.

The Board agrees that the time periods are short for filing objections to an ALJ's decision and for the Board's review of that decision in light of the objections. That fact does not, however, require a finding that the objecting party is not entitled to file what would otherwise be termed an "opening brief." The Part 900 regulations require that any such opening brief be in the form of "precise and specific written objections to the recommended decision," and be filed within 30 days of the objecting party's receipt of the ALJ's decision. No other restrictions are placed on the type of document which an objecting party is allowed to file.

At page 4 of its April 30, 1997, Order denying the Tribe's motion to dismiss, the Board stated that 25 C.F.R. § 900.167 did "not provide for briefing on the objections." By this the Board meant that the regulation did not authorize a full briefing schedule, consisting of an opening brief, an answer brief, and a reply brief, that would normally be available to parties in appeals before the Board. See 43 C.F.R. 4.311.

The Board agrees with the Tribe that BLM's Opening Brief was not filed in accordance with the Part 900 regulations. However, this case is sui generis. It is the only ISDA case which was filed during the interim time period after the Part 900 regulations were published in the Federal Register, but before they took effect. In filing its appeal, BLM followed the instructions given in the OHA Director's July 17, 1996, Order and reiterated in Judge Heffernan's Decision. It was not until April 28, 1997, when the OHA Director transferred this case to the Board, that anyone associated with this matter knew that the appellate procedural regulations in 25 C.F.R. Part 900 would be applied to it.

With the unique procedural problems raised in this case and the general requirements of due process firmly in mind, the Board concludes that, if err it must, it will err on the side of allowing consideration of materials that

BLM filed in the reasonable belief that it was following the proper procedural requirements. The Board therefore denies the Tribe's motion to strike BLM's Opening Brief in its entirety.

Alternatively, the Tribe contends that certain portions of BLM's Opening Brief should be stricken because the arguments presented go beyond what BLM argued to Judge Heffernan. The BLM disputes this contention. The Board will address this issue in the Discussion and Conclusions section below.

The Tribe also argues that Judge Heffernan's decision is already final. It first contends that the Judge's decision is final because BLM failed to file its objections with the Board, as is required by 25 C.F.R. § 900.166. This argument is rejected for the reason discussed above, because BLM filed its appeal in accordance with the appeal instructions given in the OHA Director's Order assigning the matter to Judge Heffernan and in the Judge's Decision.

The Tribe next argues that, under 25 C.F.R. § 900.166, the Judge's decision automatically became final 20 days after BLM filed its Notice of Appeal, i.e., on March 10, 1997, because the Board did not modify or reverse the decision within that time period. The Tribe contends that it is irrelevant that the Board did not receive BLM's Notice of Appeal from the OHA, Director until April 28, 1997, because the language of the regulation is mandatory, and, as the Board noted in its order denying the Motion to Dismiss, the Board "'lacks authority to overrule, ignore, or declare invalid a duly promulgated regulation.'" Motion to Strike at 8, quoting from Order Denying Motion to Dismiss at 4.

The BLM contends that Judge Heffernan's decision is not final because OHA failed to give it proper notice of the appeal procedures.

The Board again concludes that, if err it must, it will err by declining to withdraw previously granted procedural rights. Under the unique circumstances of this case, in which the procedural requirements were changed mid-stream, the Board holds that the 20-day period established in 25 C.F.R. 900.167 began to run on April 28, 1997, when the OHA Director determined that the regulations in Part 900 should be applied in considering BLM's objections to Judge Heffernan's decision. Under this holding, the review period expires on May 19, 1997. This holding applies to this case only and has no precedential value.

This leaves the matter of the Tribe's request in its Motion to Dismiss that it be granted an extension of time for responding to BLM's brief. If this matter had proceeded under 43 C.F.R. Part 4, Subpart G, the Tribe would have had an opportunity to respond to BLM's brief. As previously mentioned, however, 25 C.F.R. §§ 900.166 and 900.167 do not anticipate the filing of responses to an objection to an ALJ's decision, and 25 C.F.R. § 900.167 requires a decision by the Board within 20 days from its receipt of objections to an ALJ's decision. It would seem reasonable that the parties could agree to an extension of the Board's 20-day review period in order to allow more complete briefing; however, as it did in its April 30, 1997, Order denying

the Tribe's motion to dismiss, the Board declines to decide that question in the context of this case.

Although, given the OHA Director's April 28, 1997, Order, the Board believes that it is required to hold itself to the 20-day review period established in 25 C.F.R. § 900.167, such a determination would preclude the Tribe from filing the answer brief it would have been entitled to file under 43 C.F.R. Part 4, Subpart G. Therefore, again erring in favor of previously granted procedural rights, the Board holds that even though the Part 900 regulations do not address the filing of petitions for reconsideration, if the Tribe is dissatisfied with this decision, the Board will entertain a petition for reconsideration from the Tribe if such a petition, including specific argumentation, is filed with the Board within 30 days of the Tribe's receipt of this decision. This determination is made in the unique context of this case only and does not constitute a Board decision concerning the filing of petitions for reconsideration in any other appeal from an ALJ's decision in an ISDA matter.

Discussion and Conclusions

On appeal, BLM objects to only one aspect of Judge Heffernan's decision. It contends that the Judge erred in approving $19,928.13 in startup costs claimed by the Tribe.

Startup costs are addressed in subsections (a)(5) and (a)(6) of 25 U.S.C. § 450j-1(a), which delineates the amount of funding to which a contracting entity is entitled. Section (a) provides:

> (1) The amount of funds provided under the terms of self-determination contracts entered into pursuant to this subchapter shall not be less than the appropriate Secretary would have otherwise provided for the operation of the programs or portions thereof for the period covered by the contract * * *.
>
> (2) There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which--
>
> (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
>
> (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.
>
> (3)(A) The contract support costs that are eligible for the purposes of receiving funding under this subchapter shall include the costs of reimbursing each tribal contractor for reasonable and allowable costs of--

(i) direct program expenses for the operation of the Federal program that is the subject of the contract; and

(ii) any additional administrative or other expense related to the overhead incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract,

except that such funding shall not duplicate any funding provided under subsection (a)(1) of this section.

* * * * * *

(5) Subject to paragraph (6), during the initial year that a self-determination contract is in effect, the amount required to be paid under paragraph (2) shall include startup costs consisting of the reasonable costs that have been incurred or will be incurred on a one-time basis pursuant to the contract necessary--

(A) to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract; and

(B) to ensure compliance with the terms of the contract and prudent management.

(6) Costs incurred before the initial year that a self-determination contract is in effect may not be included in the amount required to be paid under paragraph (2) if the Secretary does not receive a written notification of the nature and extent of the costs prior to the date on which such costs are incurred.

Initially, the Board notes that there is no dispute here that the Tribe provided BLM with the notice required by 25 U.S.C. § 450j-l(a)(6). See Letter of Dec. 13, 1995, from the Tribe to the BLM State Director.

Subsections (a)(5) and (a)(6) were added to section 450j-1(a) on October 25, 1994, by Pub. L. No. 103-413, 108 Stat. 4257-4259. The Board is not aware of any legislative history associated with the 1994 ISDA amendments.

Startup costs are addressed in the regulations at 25 C.F.R. § 900.7, which deals with technical assistance in preparing an initial ISDA contract proposal. The regulation states:

The Secretary shall, upon request of an Indian tribe or tribal organization and subject to the availability of appropriations, provide technical assistance on a non-reimbursable basis to such Indian tribe or tribal organization to develop a new contract proposal or to provide for the assumption by the

> Indian tribe or tribal organization of any program, service, function, or activity (or portion thereof) that is contractible under [ISDA]. The Secretary may also make a grant to an Indian tribe or tribal organization for the purpose of obtaining technical assistance, as provided in section 103 of [ISDA (25 U.S.C. § 450h)]. An Indian tribe or tribal organization may also request reimbursement for pre-award costs for obtaining technical assistance under sections 106(a)(2) and (5) of [ISDA (25 U.S.C. § 450j-1(a)(2) and (5))] .

This regulation was discussed in the preamble to the Federal Register publication of the regulations at 61 Fed. Reg. 32,482, 32,485 (June 24, 1996):

> Several comments recommended amending § 900.7 to permit the Secretary to provide technical assistance funding in addition to technical assistance. To reflect the concerns the two sentences were added at the end of the section. The first sentence authorizes the Secretary to make technical assistance grants, and the second authorizes an Indian tribe or tribal organization to request reimbursement of pre-award costs for obtaining technical assistance under [ISDA].

Before Judge Heffernan, BLM objected to the Tribe's claimed startup costs by reference to broad categories of expenditures. Without distinguishing among these categories, Judge Heffernan found that the Tribe's overall claim for $19,928.13 in startup costs was reasonable and approved that amount. On appeal, BLM raises a line-by-line challenge to the Tribe's claimed startup costs and continues as well to object to broad categories of claimed costs.

In its Motion to Strike, the Tribe contends that the Board should not consider any arguments which BLM did not raise to Judge Heffernan. In particular, it argues that BLM did not challenge its claimed startup costs on a line-by-line basis before the Judge, and therefore cannot do so on appeal. The Tribe bases this contention on both general principles of due process and decisions in which the Board has held that it is not required to consider arguments raised for the first time on appeal. See, e.g., Gauthier v. Portland Area Director, 18 IBIA 303, 305 (1990) ("The rule is intended to require parties in adversary proceedings to present all of their arguments and evidence to the initial decision maker in order to permit the issuance of a prompt and informed decision at the earliest stage in the proceeding and to conserve the time, energy and resources of everyone involved in the appeal, including the parties"). Although acknowledging that the Board has also held that it may consider new arguments under extraordinary circumstances through exercise of the inherent authority of the Secretary to correct a manifest injustice or error (43 C.F.R. § 4.318; Estate of Virginia Enno Poitra, 16 IBIA 32 (1988)), the Tribe contends that no such extraordinary circumstances exist here.

With the exception of an expenditure for drafting a letter to Senator Max Baucus, before Judge Heffernan BLM did not attack specific items

of claimed startup costs on a line-by-line basis. The record suggests that BLM essentially attempted an "all-or-nothing" litigation strategy during the hearing stage, making general challenges to the Tribe's claimed expenses, while addressing few of the specific items. The BLM now attempts to make these line-by-line challenges on appeal, contending that they "represent nothing more than an alternative approach to making BLM's oft-repeated argument" that these claimed costs were unreasonable. Opposition to Motion to Strike at 7.

The Board cannot agree with BLM that the litigation strategy now set forth in its Opening Brief is merely "an alternative approach." Rather, BLM presents entirely new arguments. The Board agrees with the Tribe that BLM had the opportunity to make a line-by-line challenge to the Tribe's claimed startup costs before Judge Heffernan, and that there are no extraordinary circumstances present here that would justify departure from the normal rule of appellate practice that new arguments are not considered for the first time on appeal. Accordingly, the Board will not consider BLM's new line-by-line challenges to the Tribe's claimed startup costs.

The BLM did object to some of the Tribe's claimed startup costs before Judge Heffernan. The BLM contended that startup costs should not include:

> 1) the costs of preparing [an ISDA] contract proposal for the Tribe's solid minerals program, 2) the costs of unsuccessfully negotiating the term of said [ISDA] contract, [5/] 3) the costs of soliciting assistance from Senator Max Baucus and other individuals, and 4) the costs of appealing the BLM's decision to fund said [ISDA] contract at a level below that initially requested by the Tribe.

Dec. 4, 1996, Response Brief at 12. In other places, BLM summarizes these costs, excluding the letter to Senator Baucus, as costs of "preparing, negotiating, and appealing." E.g., Id. at 14.

Although BLM generally challenged "preparing and negotiating" costs, it cited no support for its contention that these costs may not be included in startup costs. It did, however, present several public policy arguments against payment of "preparing and negotiating" costs. It contended that if the Tribe were reimbursed for these expenses, it might "motivate contracting tribal organizations to prolong preparations and negotiations in an effort to increase the contract's level of funding through preliminary costs." Id. at 15. It continued: "Federal agencies, attempting to control contract support costs or preliminary costs, may be disinclined to enter into any negotiation process with contracting tribal entities. Such an approach

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5/ The Board notes that costs associated with the negotiation of the contract were one category of expenditures which the Tribe specifically mentioned in its Dec. 13, 1995, letter informing BLM that it would be incurring startup costs.

would arguably conflict with the ISDA's purpose and the statutory requirement obligating agencies to provide assistance to contracting tribes. 25 U.S.C. § 450f(b)(2)." Id.

[2] Under 25 U.S.C. § 450j-1(a)(5), the Department must reimburse a tribe for the reasonable costs necessary "to plan, prepare for, and assume operation of the program, function, service, or activity that is the subject of the contract." The BLM's argument must be that "preparing and negotiating" costs are not costs necessary "to plan, prepare for, and assume operation of the program." However, BLM did not present any support for that argument before Judge Heffernan--or on appeal. Subsection 450f(e)(1) places on BLM the burden of proving that claimed costs are not appropriate:

> With respect to any hearing or appeal conducted pursuant to subsection (b)(3) of this section [establishing the right to appeal from a declination decision], the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for declining the contract proposal (or portion thereof).

The Board concludes that, under the circumstances of this case, BLM has failed to carry its burden of proving that costs associated with "preparing and negotiating" an ISDA contract are not proper startup costs under subsection (a)(5).

The BLM also argued before Judge Heffernan that the costs associated with the Tribe's administrative appeal should not be recoverable as startup costs. Again, BLM did not cite any authority for this argument, but made another public policy argument: "[C]ontracting tribal organizations, intent upon raising the contract's level of funding by challenging agency decisions, may file frivolous ISDA appeals or appeals that would not otherwise have been filed." Dec. 4, 1996, Response Brief at 15.

[3] Although the Board finds that BLM has not presented a persuasive argument as to why appeal costs should not be included in startup costs, it also finds that it is not at liberty to ignore the clear mandates of ISDA. The reimbursement of tribal costs in prosecuting an administrative appeal is addressed in 25 U.S.C. § 450m-1(c), which provides: "The Equal Access to Justice Act [EAJA, 5 U.S.C. § 504], * * * shall apply to administrative appeals pending on or filed after October 5, 1988, by tribal organizations regarding self-determination contracts."

In 5 U.S.C. § 504(a)(1), EAJA provides for the award of "fees and other expenses" incurred by a prevailing party in certain administrative proceedings. Subsection 504(b)(1)(A) defines "fees and other expenses" to "include[] the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees."

Departmental regulations implementing EAJA appear at 43 C.F.R. §§ 4.601-4.619. Pursuant to 25 C.F.R. § 900.177, these regulations apply

to EAJA claims made in connection with an administrative appeal arising under ISDA. See also Tohatchi Special Education and Training Center v. Navajo Area Director, 26 IBIA 138 (1994).

Because ISDA provides a specific mechanism for reimbursing tribal costs arising from an administrative appeal, it is improper to award those costs under another mechanism, i.e., startup costs. The Tribe's itemized schedule of startup costs shows that those expenses incurred from May 20 through June 28, 1996, inclusive, are generally devoted to issues relating to the appeal. The Tribe claimed a total of 126 hours during this time period. Items not readily identifiable as being related to the appeal are: (1) May 22 (2 hours); (2) June 14 (6 hours); (3) June 18 (part of 4 hours); (4) June 19 (part of 4 hours); (5) June 20 (6 hours); (6) June 25 (2 hours); and (7) June 27 (4 hours). Giving the Tribe the benefit of every doubt because it has not had an opportunity to respond to this issue, the Board concludes that the Tribe should be reimbursed for the 28 hours listed above which do not appear to be related in toto to the appeal, but not for the remaining 98 hours which are attributable to the administrative appeal. The itemized schedule shows that the Tribe claimed reimbursement for salary at the rate of $31.67 per hour. Accordingly, the Tribe's startup costs should be reduced by a total of $3,103.66 for salary expenses associated with the administrative appeal of BLM's declination decision.

In addition, four trips were included during this time period which are also associated with the administrative appeal. The total amount claimed for these trips was $161.40. Therefore, this amount must also be deducted from the startup costs. Reducing the amount of $19,928.13 which Judge Heffernan approved as startup costs by $3,103.66 and $161.40 leaves an amount for startup costs of $16,663.07.

If it files a proper application under EAJA, the Tribe may include these disallowed costs in that application. Any such application will be considered under EAJA. The Tribe may not, however, include any amount for June 18 or 19, 1996, for this employee, because it was given the benefit of the doubt as to these costs and was reimbursed under startup costs.

Before Judge Heffernan, BLM also challenged the costs claimed for the drafting of a letter to Senator Baucus. Once again BLM did not favor Judge Heffernan with any support for its assertion that this cost was not allowable. However, on appeal, BLM contends that this expenditure was not allowable under several Office of Management and Budget (OMB) publications which address the use of appropriated funds for lobbying purposes. The Tribe contends that the OMB publications cannot be considered because they were not raised before Judge Heffernan.

Although BLM did not cite any support for this argument before Judge Heffernan, and cites only OMB publications on appeal, the Board again finds that it cannot ignore a relevant Federal statute. Section (a) of 31 U.S.C. § 1352 provides in pertinent part:

> (1) None of the funds appropriated by any Act may be expended by the recipient of a Federal contract * * * to pay

> any person for influencing or attempting to influence * * * a Member of Congress * * * in connection with any Federal action described in paragraph (2) of this subsection.
>
> (2) The prohibition in paragraph (1) of this subsection applies with respect to the following Federal actions:
>
> (A) The awarding of any Federal contract.

As defined in subsection 1352(g)(1)(B), "recipient" "does not include an Indian tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts * * * from an agency but only with respect to expenditures that are by such tribe or organization for purposes specified in subsection (a) and are permitted by other Federal law." 6/ Subsection 1352(g)(11) incorporates the ISDA definition of "Indian tribe" and "tribal organization" from 25 U.S.C. § 450b. Section 1352 does not define "Federal contract."

Joint regulations were published by several Federal agencies to implement 31 U.S.C. § 1352. The Department's regulations are found in 43 C.F.R. Part 18. "Federal contract" is defined in 43 C.F.R. § 18.105(c) as "an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR." Section 18.105(l) and (o) define the words "person" and "recipient" to exclude Indian tribes, tribal organizations, or other Indian organizations "with respect to expenditures specifically permitted by other Federal law."

Because both the statute and the regulations permit Indian tribes to make lobbying expenditures that would be illegal if made by others, if the expenditure is permitted by other Federal law, the question becomes whether the burden is on the Tribe to show that the expenditure was permitted, or on BLM to show that it was not. As previously discussed, 25 U.S.C. § 450f(e)(1) places the burden of proof on BLM. The Board concludes that BLM has failed to carry its burden of proving that the drafting of the letter to Senator Baucus was not an allowable item of startup cost.

In summary, the Board finds that the Tribe's claimed startup costs must be reduced to a total amount of $16,663.07. It therefore modifies Judge Heffernan's decision as discussed above to award that amount in startup costs.

The next question is how these startup costs are to be paid.

The Tribe contended, and Judge Heffernan accepted, that startup costs were a separate category of expenses, so that the total contract funding

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6/ Section 1352(g)(3)(B) provides a similar exclusion from the definition of "person," in a slightly less garbled form.

amount for the first year of this ISDA contract would include direct costs, indirect costs, and startup costs. The Judge held:

> [T]he plain meaning of 25 C.F.R. § 450j-1(a)(5)(A) is to authorize the reimbursement of certain pre-contract planning costs, which are specifically in addition to normal, administrative indirect contract costs, which are incurred only after execution of the contract. This interpretation is further buttressed by the fact that the statute specifically provides that such start-up costs can only be recouped "during the initial year that a self-determination contract is in effect... ." 25 C.F.R. § [450]j-i(a)(5). Therefore, the statute, as well as the new regulations, clearly distinguish such one-time planning costs from otherwise applicable indirect costs, because indirect costs, by definition, extend for the entire life and duration of the contract, not just "during the initial year... ."

Decision at 10-11.

Based on the 1988 ISDA amendments, adding, inter alia, 25 U.S.C. 450j-1; the legislative history of the 1988 amendments; OMB Circular A-87, Attachment B, No. 34; and Ramah Navajo School Board v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996), BLM vigorously argues that startup costs are not a separate category of funding, but are included in the indirect cost percentage rate. It also contends that Judge Heffernan erred in holding that indirect costs can only be incurred after execution of the contract.

As noted above, subsections (a)(5) and (a)(6) were added to 25 U.S.C. 450j-1(a) in 1994. The Board finds nothing in the 1988 amendments to ISDA and the 1988 legislative history which is relevant to a determination of Congressional intent in amending the statute again in 1994.

The Board has carefully read 25 U.S.C. § 450j-1(a) and the regulations in Part 900, which, in the absence of legislative history for the 1994 amendments, it concludes are the only applicable sources of information on what Congress intended in adding subsections (a)(5) and (a)(6) in 1994. The words of the statute clearly show that Congress intended to ensure that a tribe would be reimbursed for costs incurred in planning, preparing for, and assuming the function to be contracted. In implementing this provision, the negotiated rulemaking committee clearly believed that this reimbursement was intended to provide an additional source of funding for technical assistance. Because Congress had previously authorized Departmental bureaus to provide technical assistance to a contracting tribe or tribal organization, and had authorized technical assistance grants, it is possible that Congress did not believe these sources of funding for technical assistance were sufficient and therefore authorized a third source of funds, i.e., the contract itself. The Board is unaware of any Congressional objections to the negotiated rulemaking committee's interpretation of subsections (a)(5) and (a)(6). It notes that part of the reason for the extended period of time between the publication of the ISDA regulations and their effective date was to allow Congressional review of those regulations. Cf. 25 U.S.C. § 450k(c).

The BLM's primary concern over the payment of startup costs appears to be based on its reading of subsection (a)(5) as making startup costs equivalent to "contract support costs" within the meaning of subsection (a)(2). Because of its reading of the statute, OMB Circular A-87, and Ramah Navajo School Board, BLM argues that startup costs must be categorized as either direct costs, indirect costs, or unallowable costs. 7/ At page 5 of its Opening Brief, BLM asserts: "According to Judge Heffernan, the $19,928.13 [now $16,663.07] in startup costs should be added to the $43,992.91 in direct program costs and indirect costs for a total contract funding base of $63,921.04." It is not immediately evident from the materials before the Board what BLM means by the phrase "total contract funding base." Because the parties resolved most of their funding disputes, Judge Heffernan's decision does not show the total contract amount, broken down into direct costs and indirect costs, but merely addresses the three issues on which the parties were not able to agree. The Board has not found any other document which clearly sets out the agreed upon funding amount for direct costs, although there are references to a negotiated 31 percent indirect cost rate. 8/

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7/ Attachment B, No. 34, of OMB Circular A-87, 60 Fed. Reg. 26,484, 26,500 (May 17, 1995), provides:

"Costs of preparing proposals for potential Federal awards are allowable. Proposal costs should normally be treated as indirect costs and should be allocated to all activities of the governmental unit utilizing the cost allocation plan and indirect cost rate proposal. However, proposal costs may be charged directly to Federal awards with the prior approval of the Federal awarding agency."

This section is discussed, but not clarified, in the preamble at 60 Fed. Reg. 26,487:

"Comment. It is not clear why proposal costs should normally be treated as indirect costs and allocated to all activities. Such costs should be treated as direct costs if they can be identified with a specific award.

"Response. OMB added a provision to allow governmental units to charge proposal costs directly to a Federal award with the prior approval of the Federal awarding agency."

Prior to May 17, 1995, Attachment B, No. 34, consisted of only the first sentence. The May 1995 finalization of Circular A-87 occurred after the enactment of the 1994 amendments to ISDA which added 25 U.S.C. §§ 450j-1(a)(5) and (a)(6). The Board has carefully reviewed the preamble to the 1995 publication of Circular A-87 to determine if there is any evidence that the ISDA amendments were specifically considered in finalizing the Circular. It found no such evidence.

Ramah Navajo School Board, without reference to 25 U.S.C. § 450j-1(a)(5), discussed how "contract support funds" are determined.

8/ For purposes of this decision, the Board assumes that a 31 percent indirect cost rate is the percentage rate agreed upon by the parties for the first year of this contract.

The BLM argues on appeal that startup costs have already been included in the negotiated 31 percent indirect cost rate. In addition to the fact that BLM did not raise any such argument before Judge Heffernan, this claim is contrary to BLM's actions and statements during the negotiations for this contract, which show BLM agreement to pay the Tribe's startup costs without mention of the indirect cost rate. Furthermore, there is no evidence that either of the parties negotiated the 31 percent indirect cost rate with the intent of reimbursing the Tribe's startup costs through that figure.

The Board rejects BLM's argument that the negotiated 31 percent indirect cost rate for this contract was intended to include reimbursement for the Tribe's startup costs.

The BLM also failed to make any argument before Judge Heffernan concerning the effect of OMB Circular A-87 on this dispute. Before the Board, however, BLM contends that this Circular requires startup costs to be included in the indirect cost rate. Because the issue was not timely raised, making full development of the arguments impossible, and because a ruling by the Board on this point has the potential for significant impact on other cases, the Board declines to address the argument here. Accordingly, the Board also declines at this point to decide whether the Tribe's startup costs here--or in other cases--should be paid as a part of the indirect cost rate or as a separate funding category. The parties here may agree between themselves as to how to reimburse the startup costs approved above, so long as the Tribe receives the full amount of the approved startup costs during the first year of the contract. The two choices available, as far as the Board can see, are: (1) a one-time payment of,$16,663.07 or (2) a recalculation of the indirect cost rate, for the first year of the contract only, increasing the percentage in an amount sufficient to provide the Tribe with an additional $16,663.07.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 900.167, Judge Heffernan's January 22, 1997, decision is affirmed as modified in this decision. The total amount of approved startup costs is reduced to $16,663.07.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge